



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: MARCH 01, 2023

IN THE MATTER OF:

Appeal Board No. 626887

PRESENT: MARILYN P. O'MARA, MEMBER

In Appeal Board Nos. 626885, 626886 and 626887, the Commissioner of Labor appeals from the decisions of the Administrative Law Judge filed November 16, 2022, which overruled the initial determinations disqualifying the claimant from receiving benefits, effective May 7, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to May 7, 2022 cannot be used toward the establishment of a claim for benefits; charging the claimant with an overpayment of \$2,254.00 in benefits recoverable pursuant to Labor Law § 597 (4); and reducing the claimant's right to receive future

benefits by eight effective days and charging a civil penalty of \$338.10 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances on behalf of the claimant and the employer.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked full time as a behavior technician at a group home for people with developmental disabilities. She worked from October 17, 2016 through November 24, 2021, when she went on a medical leave of absence.

On February 22, 2022, while on medical leave, the claimant was arrested in

connection with her relationship with her daughter's father. In a notification from the Justice Center for the Protection of People with Special Needs, the employer learned of the claimant's arrest and the charges against her. The notification included a directive to the employer stating that: "A safety assessment of the service environment must be conducted, and all appropriate steps to protect the health and safety of the persons receiving services must be taken." The claimant was aware that the Justice Center would notify the employer of any arrests.

Once the claimant's medical leave ended on May 5, 2022, the employer immediately placed her on administrative leave pending the resolution of her criminal charges. On June 15, 2022, the claimant pled guilty to a reduced charge of Reckless Endangerment in the 2nd Degree, a Class A Misdemeanor. The employer did not immediately learn of the claimant's guilty plea. On July 6, 2022, while the claimant was on administrative leave, she filed a claim for unemployment insurance benefits and certified that she separated from employment due to lack of work.

The employer could not return the claimant to work without any disposition of the charges against her. When the employer had not learned of any resolution of the charges by July 2022, the employer determined that they could not continue to hold the claimant's job open. The employer had a staff member call the claimant on July 12. This person asked the claimant whether court was over. The claimant said she was going back to court on August 30. By letter dated July 18, 2022, the employer informed the claimant that she was discharged effective July 12, 2022.

The claimant was sentenced on August 30, 2022 to a one-year conditional discharge and a five-year order of protection in addition to applicable court fees and surcharges.

The claimant received \$2,254.00 in benefits.

**OPINION:** The credible evidence establishes that the claimant was discharged from her job after the claimant was arrested for conduct that ultimately resulted in her pleading guilty to a charge of Reckless Endangerment in the Second Degree, a misdemeanor. Section 120.20 of the Penal Law provides that "A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." This conduct bears upon the claimant's

fitness to work as a behavior technician at a group home for the developmentally disabled. The claimant acknowledges that she was aware that the employer would be notified in the event she was arrested. She knew or should have known her actions would jeopardize her job. Accordingly, we conclude that the claimant lost her job by reason of misconduct, and the claimant is disqualified from receiving benefits. Therefore, the benefits that the claimant received constitute an overpayment.

The credible evidence further establishes that, while she was on administrative leave, the claimant filed a claim for benefits and certified that she separated from employment due to a lack of work. At the time when she filed her claim, on July 6, 2022, the claimant had not yet been discharged. Therefore, she could not have concealed the fact that she was discharged. "Lack of work" reasonably fit the circumstances of her indefinite leave. Her certification, therefore, was not factually false. Accordingly, we conclude that the overpayment of benefits is non-recoverable. We further conclude that, as the claimant did not certify falsely, she did not make a willful misrepresentation and is not subject to a forfeiture penalty or civil monetary penalty.

DECISION: The decisions of the Administrative Law Judge are modified as follows and, as so modified, are affirmed.

In Appeal Board No. 626885, the initial determination, disqualifying the claimant from receiving benefits, effective May 7, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to May 7, 2022 cannot be used toward the establishment of a claim for benefits, is sustained.

In Appeal Board No. 626886, the initial determination, charging the claimant with an overpayment of \$2,254.00 in benefits recoverable pursuant to Labor Law § 597 (4), is modified to hold the overpayment non-recoverable, and, as so modified, is sustained.

In Appeal Board No. 626887, the initial determination, reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$338.10 on the basis that the claimant made a willful misrepresentation to obtain benefits, is overruled.

MARILYN P. O'MARA, MEMBER